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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2014-2015

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Raleigh Levon Hill, Sr.

v.

Beverly Collier Hill

Appeal from Madison Circuit Court
(DR-11-1392)

PITTMAN, Judge.

Raleigh Levon Hill, Sr. ("the husband"), appeals from a judgment of the Madison Circuit Court ("the trial court") divorcing him and Beverly Collier Hill ("the wife") (1) insofar as that judgment awarded the wife a property

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settlement in the amount of \$162,623.86, which, the trial court found, represented one-half of the husband's net winnings from a lottery and (2) insofar as it awarded the wife one-half of the value of the husband's retirement account. We affirm.

Procedural History

In September 2011, approximately 23 years after the husband had left her and the parties' three children on July 29, 1988, the wife sued the husband for (1) a divorce on the ground of abandonment and incompatibility, (2) a property settlement, and (3) a share of the husband's retirement account.¹ Also in September 2011, the trial court entered its standing pendente lite order, which, among other things, ordered the parties to preserve their assets in the form in which they existed upon the entry of the pendente lite order. The husband was served with process on October 1, 2011. Answering, the husband asserted (1) that he had divorced the wife in 2002 by means of a purported divorce judgment he had procured over the Internet from a Mexican court ("the

¹Although the parties had three children, they were all over the age of 19 when the wife filed her divorce complaint and, therefore, she made no claim for custody or child support.

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purported Mexican divorce"), which, he said, deprived the trial court of subject-matter jurisdiction over the wife's action, and (2) that the wife's claims were barred by the doctrines of equitable estoppel and laches.

In June 2013, the trial court held a bench trial at which it received evidence ore tenus. The issues tried were (1) whether the purported Mexican divorce was valid, (2) whether the wife was entitled to a share of the assets accumulated by the husband after July 29, 1988, and (3) whether the wife was entitled to a share of the husband's retirement account.

After the trial, the parties submitted posttrial briefs. In her posttrial brief, the wife asserted that the purported Mexican divorce was void because, she said, the husband had procured it through fraud by misrepresenting to the Mexican court that he and the wife had resided in Mexico and because, she said, the husband had neither notified her that he was seeking that divorce nor served her with process. She also asserted that she was entitled to a share of the assets the husband had accumulated after July 29, 1988, and that she was entitled to a share of his retirement account. In his posttrial brief, the husband conceded that the purported

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Mexican divorce judgment was invalid, that the parties were still married, and that the trial court had jurisdiction over the wife's action. However, he asserted that the wife was estopped from claiming any portion of the assets he had accumulated after July 29, 1988, and any portion of his retirement account because, he said, both parties had led separate lives since July 29, 1988, and the wife had indicated on her income-tax returns and other documents filed since July 29, 1988, that she was single.

In September 2013, the trial court entered a judgment that determined that the purported Mexican divorce was void; determined that the trial court had jurisdiction over the wife's action; divorced the parties on the ground of incompatibility; found that money the husband had won in the North Carolina Educational Lottery ("the lottery") in 2011 constituted marital property; awarded the wife a property settlement in the amount of "\$162,623.86, representing one-half of [the husband's] after-tax lottery winnings"; and awarded the wife one-half of the value of the husband's retirement account. The husband timely filed a postjudgment motion challenging the judgment insofar as it awarded the wife

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a property settlement and one-half of the value of his retirement account. The trial court did not rule on the husband's postjudgment motion within 90 days after it was filed; consequently, that motion was denied by operation of law pursuant to Rule 59.1, Ala. R. Civ. P., in January 2014. The husband then timely appealed to this court.

Factual Background

Because the trial court's judgment was based on evidence the trial court received ore tenus at a bench trial, we must view the evidence in the light most favorable to the prevailing party, i.e., the wife. See, e.g., Lindsey v. Aldridge, 104 So. 3d 208, 215 (Ala. Civ. App. 2012) (holding that, in reviewing a judgment based on evidence received ore tenus, an appellate court must view the evidence in the light most favorable to the prevailing party). Viewed in that manner, the evidence tended to prove the following pertinent facts.

In November 1984, when she was 17 years old, the wife gave birth to the parties' oldest child. The parties married in January 1985, while the wife was still 17 and the husband was 20. The parties had a second child in January 1987 and a

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third one in January 1988. On the morning of July 29, 1988, the husband left the parties' apartment and never returned. Before leaving, the husband had never told the wife that he was contemplating leaving. After the husband left, the wife did not hear from him until he telephoned her several weeks later and informed her that he had gone to Ohio to find a better job. The husband took the parties' only automobile when he left. By 1991, the husband had moved to North Carolina, where he was still living when this action was tried. Although the husband paid child support after the State of Alabama brought a child-support action against him on behalf of the wife in 1991, he never paid the wife any spousal support after July 29, 1988.

After the husband left on July 29, 1988, the parties had very little contact, and they never lived together again. The husband never discussed the subject of a divorce with the wife and never served her with process in a divorce action commenced by him.

In 1999, the husband met a woman named Erin Cullen and told her that he was not married. The husband and Cullen began living together shortly after they met. The husband and Cullen

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subsequently became engaged, and, approximately two weeks before their wedding in 2002, the husband informed Cullen that he could not find any record of his divorce from the wife. The husband and Cullen then found a site on the Internet indicating that a divorce could be obtained in three days from a Mexican court. Although neither the husband nor the wife had ever lived in Mexico, Cullen and the husband sat in front of their computer while Cullen typed information supplied by the husband on an Internet application for a Mexican judgment divorcing the husband and the wife. The husband submitted the application on the Internet without ever notifying the wife that he was seeking a divorce or serving her with process. The husband received the purported Mexican divorce judgment in the mail approximately three days after he had submitted his application on the Internet. The wife did not learn of the purported Mexican divorce judgment until she commenced the present divorce action. After the husband received the purported Mexican divorce, the husband and Cullen had a wedding ceremony.

Sometime before February 15, 2011, the husband purchased a ticket to participate in the lottery and, on February 15,

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2011, won \$1,000,000 in the lottery. The husband split the \$1,000,000 with Cullen, and they each received a check for one-half of the net proceeds after deduction of taxes. The check the husband received was in the amount of \$325,247.73. He deposited that check into his checking account in August 2011. Subsequently, on October 1, 2011, he was served with process in the present action. When he was served with process, the trial court had already entered its standing pendente lite order requiring the parties to preserve their assets in the form they were in when that order was entered. Despite that provision of the standing pendente lite order, the husband, on November 28, 2011, purchased a house ("the house") with a purchase price of \$299,405 using the proceeds of the \$325,247.73 check he had received from the lottery.

After leaving the wife and the children on July 29, 1988, the husband obtained employment with U.S. Airways and was still employed by U.S. Airways when this action was tried. He has a retirement account with U.S. Airways, and his interest in that account is 100% vested. According to his retirement account's quarterly statement for the first quarter of 2013, the last quarterly statement available when this action was

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tried, the value of his retirement account at the end of that quarter was \$30,357.51.

Standard of Review

Because the trial court received evidence ore tenus, our review is governed by the following principles:

""'[W]hen a trial court hears ore tenus testimony, its findings on disputed facts are presumed correct and its judgment based on those findings will not be reversed unless the judgment is palpably erroneous or manifestly unjust.'" Water Works & Sanitary Sewer Bd. v. Parks, 977 So. 2d 440, 443 (Ala. 2007) (quoting Fadalla v. Fadalla, 929 So. 2d 429, 433 (Ala. 2005), quoting in turn Philpot v. State, 843 So. 2d 122, 125 (Ala. 2002)). "The presumption of correctness, however, is rebuttable and may be overcome where there is insufficient evidence presented to the trial court to sustain its judgment.'" Waltman v. Rowell, 913 So. 2d 1083, 1086 (Ala. 2005) (quoting Dennis v. Dobbs, 474 So. 2d 77, 79 (Ala. 1985)). 'Additionally, the ore tenus rule does not extend to cloak with a presumption of correctness a trial judge's conclusions of law or the incorrect application of law to the facts.' Waltman v. Rowell, 913 So. 2d at 1086."

Retail Developers of Alabama, LLC v. East Gadsden Golf Club, Inc., 985 So. 2d 924, 929 (Ala. 2007).

Analysis

The husband first argues that the trial court erred in awarding the wife one-half of the value of his retirement account because, he says, the trial court could award the wife

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a share of that account only if the wife had proved the present value of the account on the date the wife filed her complaint commencing this divorce action and the wife failed to do so. The wife proved the present value of the account on the day of trial but did not prove the present value of it on the day she filed her complaint. The husband's argument finds some support in some decisions of this court, see, e.g., Clore v. Clore, 135 So. 3d 264, 270 (Ala. Civ. App. 2013), and Smith v. Smith, 964 So. 3d 663, 669 (Ala. Civ. App. 2005); however, this court's most recent decisions addressing this issue do not support his argument. In Stover v. Stover, [Ms. 2130795, Feb. 20, 2015] ____ So. 3d ____, ____ (Ala. Civ. App. 2015), this court, citing Robicheaux v. Robicheaux, 731 So. 2d 1222, 1224 (Ala. Civ. App. 1998), held that the Morgan Circuit Court had erred in concluding that Mr. Robicheaux's retirement account was not subject to division pursuant to Ala. Code 1975, § 30-2-51(b), because of Mrs. Robicheaux's failure to prove its present value on the date the action for divorce was commenced. In pertinent part, this court stated:

"As we explained in Robicheaux v. Robicheaux, 731 So. 2d 1222, 1224 (Ala. Civ. App. 1998), § 30-2-51(b) 'does not indicate when the present value of the retirement benefits is to be determined.' The

statute provides that a court may include in the estate of either spouse: (1) the present value of any future retirement benefits, (2) the current retirement benefits that a spouse may have a vested interest in, or (3) the current retirement benefits that a spouse may be receiving 'on the date the action for divorce is filed.' An award of a future retirement benefit does not require evidence demonstrating its present value 'on the date the action for divorce is filed.'

"Because the undisputed evidence indicated that the present value of the Great-West retirement account was \$45,800 [on the day of trial], the circuit court erred as a matter of law by determining that the mother failed to prove the present value of the Great-West retirement account and by determining that the mother was, for that stated reason, necessarily entitled to no portion of the Great-West retirement account. The judgment as to that issue is reversed. The cause is remanded for the circuit court to reconsider whether to award the mother an equitable portion of the Great-West retirement account."

Stover, ___ So. 3d at ___ (emphasis added).

Moreover, in Crowder v. Crowder, [Ms. 2120928, Oct. 31, 2014] ___ So. 3d ___, ___ n.1 (Ala. Civ. App. 2014), this court, citing Robicheaux, noted that "a trial court does not err in basing its valuation of a retirement account that may be divisible under Ala. Code 1975, § 30-2-51, upon its value at the time of the entry of the divorce judgment rather than at the time of the parties' separation." Accordingly, in the present case, based on Stover, Crowder, and Robicheaux, we

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conclude that, because the wife proved the present value of the husband's retirement account on the date of trial, the trial court did not err in awarding her a share of that account despite her failure to prove the present value of that account on the date the action was commenced.

The husband next argues that the trial court erred in awarding the wife a property settlement in the amount of \$162,623.86 because, he says, it was an award of alimony in gross that exceeded the value of his estate on the date it was awarded. The undisputed evidence established that, after the husband had been served with process in the present action and after the entry of the trial court's standing pendente lite order requiring the parties to maintain their assets in the form in which they existed on the date that order was entered, the husband used the proceeds of the check he had received from the lottery in the amount of \$325,247.73 to purchase the house, which had a value of \$299,405. Although both the husband's name and Cullen's name are listed on the settlement statement prepared for the closing of the purchase of the house, which implies that Cullen is listed as a grantee on the deed to the house, the record does not contain any direct

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evidence establishing whether the house is titled solely in the name of the husband or jointly in the names of both the husband and Cullen. However, even if the house is titled jointly in the names of both the husband and Cullen, the trial court could properly have treated the entire value of the house as a marital asset in dividing the parties' marital property because the undisputed evidence indicated that the husband had paid the entire purchase price of the house using the proceeds of his lottery check, that any inclusion of Cullen as an owner of the title to the house was unsupported by any consideration, and that the use of the proceeds of the husband's lottery check to purchase the house violated the provision of the standing pendente lite order requiring the parties to preserve their assets in the form in which they existed on the date that order was entered. See Patillo v. Patillo, 414 So. 2d 915, 916 (Ala. 1982) (holding that a trial court had erred in failing to treat certain property as marital property when the evidence indicated that one spouse had transferred it to the parties' children for no consideration in order to defeat the other spouse's marital rights in it); and Baggett v. Baggett, 870 So. 2d 735, 740

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(Ala. Civ. App. 2003) ("In Alabama a transfer of ... property made to defeat a spouse's marital right is voidable." (quoting earlier cases)). Thus, the trial court could properly have deemed the entire value of the house to be a part of the marital estate for purposes of awarding the wife a property settlement on the ground that the inclusion of Cullen's name on the title was done to defeat the wife's marital interest in one-half of the value of the house. Id. Because the value of the house, i.e., \$299,405, exceeds the value of the property settlement awarded the wife, i.e., \$162,623.86, we reject the husband's second argument.

Finally, the husband argues that the division of the parties' property was not equitable.

"A division of marital property in a divorce case does not have to be equal, only equitable, and a determination of what is equitable rests within the sound discretion of the trial court. When dividing marital property, a trial court should consider several factors, including the length of the marriage; the age and health of the parties; the future prospects of the parties; the source, type, and value of the property; the standard of living to which the parties have become accustomed during the marriage; and the fault of the parties contributing to the breakup of the marriage."

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Yohey v. Yohey, 890 So. 2d 160, 164-65 (Ala. Civ. App. 2004) (quoting Golden v. Golden, 681 So. 2d 605, 608 (Ala. Civ. App. 1996)) .

In the present case, although the parties lived together for less than four years, they were legally married for over 25 years. When the action was tried, both parties were in their 40s and were in good health. The husband had worked for U.S. Airlines for over 20 years, while the wife had worked for the National Aeronautics and Space Administration for 9 years. The parties' only significant assets were the house, which the husband had purchased with his lottery winnings, and the husband's retirement account. The trial court reasonably could have found that the husband's leaving the wife and children without prior notice and his failure to return for over 20 years was the sole cause of the breakdown of the marriage.

As explained above, the trial court could properly have treated the entire \$299,405 value of the house as marital property on the ground that the inclusion of Cullen's name on the title was intended to defeat the wife's marital interest in one-half of the value of the house. With the value of the house treated in that manner, the trial court awarded the wife

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\$162,623.86 of that value and awarded the husband \$136,781.14 of it. The trial court awarded the wife one-half of the value of the husband's retirement account. Taking into account the value of the marital property awarded each party and the other pertinent factors, we cannot hold that the trial court's division of the marital property is inequitable. Therefore, we reject the husband's third and final argument. Accordingly, the trial court's judgment is due to be affirmed.

AFFIRMED.

Thompson, P.J., and Thomas, Moore, and Donaldson, JJ.,
concur.